

## University of Chicago Law School Chicago Unbound

---

Public Law and Legal Theory Working Papers

Working Papers

---

2004

# "Black on Brown"

Cass R. Sunstein

Follow this and additional works at: [https://chicagounbound.uchicago.edu/  
public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

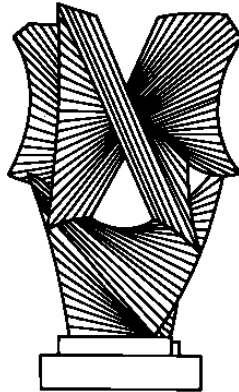
### Recommended Citation

Cass R. Sunstein, ""Black on Brown"" (University of Chicago Public Law & Legal Theory Working Paper No. 57, 2004).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 57



## BLACK ON BROWN

*Cass R. Sunstein*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

February 2004

This paper can be downloaded without charge at  
<http://www.law.uchicago.edu/academics/publiclaw/index.html>  
and at The Social Science Research Network Electronic Paper Collection:  
[http://ssrn.com/abstract\\_id=502845](http://ssrn.com/abstract_id=502845)

## **Black on Brown**

Cass R. Sunstein<sup>\*</sup>

### **Abstract**

*The most important and illuminating early writing on Brown v. Bd. of Education is a nine-page essay by Charles Black. Black memorably shows that segregation was a crucial part of a racial caste system. At the same time, he cuts through legal abstractions that made it difficult to answer the question whether the Court's decision was sufficiently "neutral." At the same time, Black's argument suffers from two serious problems: formalism and institution-blindness. Black writes as if his interpretation of the equal protection clause can be simply read off the clause, and he does not engage the complex institutional problems that were raised by the Court's decision. Nonetheless, the legal culture needs more voices like Black's.*

Of all the early writing on Brown v. Bd. of Education,<sup>1</sup> the most striking is a nine-page essay by Charles Black.<sup>2</sup> Black's essay is striking because of its simplicity, its concreteness, and its realism—its clear statement of what the system of segregation did and meant, and of the relationship between that statement and Black's reading of the Constitution.

For three reasons, Black's essay is worth careful consideration today. First, it gives a vivid sense of the social realities that Brown actually confronted—a sense that was entirely missing from the legal culture at the time, and one that often seems to have been lost in contemporary discussions of the Brown problem. Second, Black's essay offers a distinctive understanding of what the equal protection clause should be taken, above all, to forbid: the maintenance of a caste system. That understanding of the clause seems to me correct, and it bears on a number of issues today. Third, Black provides a sophisticated and morally committed version of a certain approach to constitutional

---

<sup>\*</sup> Karl N. Llewellyn Distinguished Service Professor, University of Chicago Law School.

<sup>1</sup> 347 US 483 (1954).

argument, one that retains considerable influence. I think that for all its virtues, his approach suffers from the serious vices of formalism and institutional blindness. In particular, Black's approach suffers from its failure to see the issues that have arisen as a result of the institutional turn of post-1980s constitutional law.<sup>3</sup>

We can learn a great deal about *Brown* by reading Black sympathetically. We can learn something about constitutional interpretation by reading him skeptically. Let us begin by listening to him.

### **I. The Sovereign Prerogative of Philosophers**

Black begins with a two-part argument that he describes as “awkwardly simple.”<sup>4</sup> First, the equal protection clause is best read to forbid state law from significantly disadvantaging the Negro race as such. Second, segregation counts as a massive intentional disadvantaging of the Negro race as such. “No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases. If both these propositions can be supported by a preponderance of argument, the cases were rightly decided.”<sup>5</sup>

Black attempts to support the first proposition by reference to precedent. In several cases, the Court had seemed to endorse it. To be sure, *Plessy v. Ferguson*<sup>6</sup> appeared to be “a faltering from this principle.” But even in *Plessy*, the Court did not repudiate the principle. On the contrary, the Court found it necessary to show that any disadvantaging from segregation was produced not by state law, but by the “choice” of those who construed it as a form of disadvantaging. Hence the fault of *Plessy* lay not in

---

<sup>2</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale LJ* 421 (1960).

<sup>3</sup> See Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 *Mich L Rev* 885 (2002). The institutional turn has many strands and can be found in many places. See, e.g., Gerald Rosenberg, *The Hollow Hope* (1993) (emphasizing limitations of courts in producing social change); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) (raising doubts about judicial review); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877 (1996) (emphasizing common law approach toward Constitution). For my own views, see Cass R. Sunstein, *One Case At A Time* (1999).

<sup>4</sup> *Id.* at 421.

<sup>5</sup> *Id.*

<sup>6</sup> 163 US 537 (1896).

its treatment of principle, but “in the psychology and sociology” of its approach to racial separation.<sup>7</sup> Of course Black recognizes that the idea of equal protection allows disadvantages to be placed, intentionally, on some people rather than all; bad drivers can be deprived of drivers’ licenses. The real question is whether there is a reasonable basis for inequality. This question is not always easy to answer. “But history puts it squarely out of doubt that the chief and all-dominating purpose” of the equal protection clause “was to ensure equal protection for the Negro.”<sup>8</sup> Thus the fourteenth amendment rules out all possible arguments for discrimination against African-Americans.

Black is aware that history is not without some ambiguity here and that some people believe that at the time of adoption, the fourteenth amendment was not taken to forbid racial segregation. By way of response, he urges that any judgment about “the ‘intent’ of the men of 1866 on segregation *as we know* it calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it prevails in the American South today. To guess their verdict upon the institution as it functions in the mid-twentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid.”<sup>9</sup>

It is at this point that Black starts to pick up steam. He asks whether segregation violates the equality principle, properly understood. He acknowledges that equality “has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is the solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.” This is my favorite sentence in Black’s essay; it ranks among the best sentences ever written by an American law professor.

---

<sup>7</sup> Id. at 422.

<sup>8</sup> Id. at 423.

<sup>9</sup> Id. at 424.

Black continues that the real “question remaining (after we get our laughter under control) is whether” segregation meets that description. Here Black confesses “a tendency to start laughing all over again.” The initial reason is that he himself grew up under conditions of segregation, and “it never occurred to anyone, white or colored, to question its meaning.” Nor was personal experience the only support for this conclusion. “Segregation in the South comes down in apostolic succession from slavery and the Dred Scott case. The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation.”<sup>10</sup> There was nothing consensual about segregation. It was imposed by whites, not agreed to by all.

Drawing on national experience, Black contends that separate was almost never really equal. When African-Americans were given separate beaches and washrooms, they were far worse than the beaches and washrooms given to whites. In education, “colored schools have been so disgracefully inferior to white schools that only ignorance can excuse those who have remained acquiescent members of a community that lived the Molochian child-destroying lie that put them forward as ‘equal.’”<sup>11</sup> Segregation could be understood only in its historical setting, as part of a culture in which a “society that has just lost the Negro as a slave, that has just lost out in an attempt to put him under quasi-servile ‘Codes,’ the society that views his blood as a contamination and his name as an insult, the society that extralegally imposes on him every humiliating mark of low caste and that until yesterday kept him in line by lynching . . .” Those who see what segregation actually means will not fall victim to arguments that amount to “one-step-ahead-of-the-marshall correction” (another memorable phrase from Black, capturing many forms of legal argument).

Black also seeks to explain the evident puzzlement of those in the legal culture about the plain “fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority.”<sup>12</sup> How, he asks, can people actually wonder about that not-hard question? Black contends that the answer lies in a fundamental mistake,

---

<sup>10</sup> Id.

<sup>11</sup> Id., at 426.

which is to ask the question whether “segregation amounts to discrimination” acontextually and in a historical vacuum. For lawyers and judges, the question cannot sensibly be put that way. The real question is whether segregation amounts to discrimination when it “is imposed by law in the twentieth century in certain specific states in the American Union.” That question is hilariously easy. If it seems difficult, it is only because of the absence of a “ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals.” But if this is the situation, the task of legal acumen is to find “ways to make it permissible for the Court to use what it knows; any other counsel is of despair.”

To be sure, it had been argued, most prominently by Herbert Wechsler,<sup>13</sup> that the Brown decision should be understood to involve a conflict between the associational preferences of whites and those of African-Americans. Wechsler thought that if the Court was bound by neutral principles, that conflict would be hard to resolve: “For me, assuming equal facilities, the question posed by state-sponsored segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups and races that may be involved. I think, and I hope not without foundation, that the Southern white also pays heavily for segregation, not only in the sense of guilt he must carry but also in the benefits he is denied.”<sup>14</sup> Wechsler supported this claim with an anecdote: “In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.”<sup>15</sup>

Here again we can hear Black’s ringing laughter. Houston was an exceptionally distinguished lawyer, unable to eat lunch with his white co-counsel in the nation’s capitol when engaged in legal argument before the nation’s highest court. In this world (almost) anything is possible, but it would be astonishing if Houston “did not suffer more than”

---

<sup>12</sup> Id. at 427.

<sup>13</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959).

<sup>14</sup> Wechsler, *supra* note, at 34.

<sup>15</sup> Id.

Wechsler as a result of racial segregation. In any case Wechsler's general challenge to Brown was simple: A preference for one set of associational preferences seems to violate the obligation of neutrality. How can a Court committed to neutral principles choose one set over another? To this Black responds that Wechsler has badly misconceived the idea of equality and hence that of neutrality. Of course any requirement of equality will "entail some disagreeableness for" those who benefit from inequality. In other words, the idea of equality does not counsel equality between equality and inequality; it favors the former. If the fourteenth amendment is committed to equality, then it settles the question of how to handle the conflict between the competing associational claims.

Black concludes that Brown is correct if the Constitution is "inconsistent with any device that in fact relegates the Negro race to a position of inferiority."<sup>16</sup> In an uncannily prescient statement, he urges that "in the end the decisions will be accepted by the profession on just that basis." He contends that the Court's "judgments, in law and in fact, are as right and true as any that ever was uttered." In a footnote, Black makes just one critical remark about the Court's opinion, as distinct from its holding: "the venial fault of the opinion consists in its not spelling out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race. (I would conjecture that the motive for this omission was reluctance to go into the distasteful details of the southern caste system.)"<sup>17</sup>

## II. Caste and Context

Black's essay has two cardinal virtues. The first is that he provides a clear and appealing interpretation of the equal protection clause. In Black's view, the clause forbids state law from creating anything like a caste system. He uses the term "caste" twice, and an anticaste principle<sup>18</sup> unambiguously infuses his treatment of the problem of segregation and indeed the principle for which he takes the equal protection clause to

---

<sup>16</sup>Black, *supra*, at 429.

<sup>17</sup> *Id.*

<sup>18</sup> I have argued in favor of this idea in Cass R. Sunstein, *The Anticaste Principle*, [92 Mich. L. Rev. 2410 \(1994\)](#).



stand. What makes racial segregation impermissible is that it works, in intention and in effect, to turn African-Americans into members of a lower caste. Black does not quote from Justice Harlan's dissenting opinion in *Plessy v. Ferguson*, but it is reasonable to speculate that one of Harlan's sentences helped to inspire him: "There is no caste here."<sup>19</sup> Note in this regard Black's criticism of the Court's opinion, charitably relegated to a footnote, for its failure to spell out what segregation really is and does. Within the legal culture, the failure to explore the "southern caste system," or even to name it as such, was remedied above all by Black's own article.

The anticaste principle behind Black's argument has not played the dominant role in the constitutional law of equal protection. The clearest use of that principle was in *Loving v. Virginia*,<sup>20</sup> in which the Court struck down a ban on racial intermarriage with a reference to the effort to maintain "White Supremacy."<sup>21</sup> But in the modern era, the equal protection clause has been read to forbid governments from drawing distinctions on the basis of race<sup>22</sup>—a reading that is fundamentally different from Black's. Notice that Black did not contend that segregation was unlawful because it amounted to an effort to make race relevant for purposes of policy; he did not argue for a principle of color-blindness. His claim was that segregation was unlawful because it amounted to an effort to keep one group below another—to maintain the Southern caste system. In the modern era, this view of the equal protection clause has had only one strong endorsement in a majority opinion: Justice Ginsburg's opinion for the Court in the *Virginia Military Institute* case.<sup>23</sup> I believe that the anticaste principle is the correct reading of the clause, even though its implementation would impose formidable burdens on courts.<sup>24</sup>

The second virtue of Black's essay is that it offers a vivid, concrete, and realistic understanding of segregation—a historicized understanding that cuts through the almost comically uninformative and abstract accounts offered by Wechsler and others. Black's

---

<sup>19</sup> 163 US at xx.

<sup>20</sup> 388 US 1 (1967).

<sup>21</sup> *Id.* at xx.

<sup>22</sup> See *Adarand Contractors v. Peña*, 115 S Ct 2097 (1995). Of course the doctrine here has become quite complex and unruly.

<sup>23</sup> US (199X).

emphasis on the need to attend to “social meaning” is highly illuminating here; he rightly suggests that segregation can be appreciated only if it is taken as a particular practice in the American South. He is also correct to suggest that we ought to meet with “laughter” the question whether racial segregation might not be a way of treating African-Americans equally. Not incidentally, and in Black’s spirit, I believe that laughter is also the appropriate reaction to the equally solemn question, usually answered “yes” by the current Supreme Court,<sup>25</sup> whether affirmative action programs deprive white Americans of the equal protection of the laws. To be sure, such programs present difficult questions of policy; they are often bad ideas. But on the constitutional question, the extraordinary success of constitutional assaults on affirmative action programs is shocking and disgraceful.

Black’s understanding of the anticaste principle does leave many open questions. At times he speaks of purpose. At times he speaks of effect, as in the suggestion that the Constitution “is inconsistent with any device that in fact relegates the Negro race to a position of inferiority.” We can imagine cases in which either intent or effect is operative, but not both. In any case many official practices might be seen as entrenching a caste system based on race. Does Black’s principle raise doubts about poll taxes, literacy tests for voting, educational funding systems that disproportionately benefit whites, or admissions requirements for universities that ensure overwhelming white student bodies? Would Black’s principle raise questions about inadequate welfare and job training programs? Do these also “relegate” African-Americans to a position of inferiority? And if the equal protection clause forbids the maintenance of a system of racial caste, does it also forbid the maintenance of a caste system based on gender? It would be possible to generalize, from Black’s understanding of the equal protection clause, a principle that forbids all official practices that turn morally irrelevant characteristics into a basis for social subordination. Such a generalization is very much in the spirit of Black’s analysis. But is this what he intends? And would the anticaste principle, thus understood, bear on current debates about discrimination on the basis of disability and sexual orientation?

---

<sup>24</sup> See *id.*

<sup>25</sup> See note XX *supra*.

Would it require something like an Americans with Disabilities Act as a matter of constitutional law? Would it require states to recognize same-sex marriages?

On Black's behalf we might respond that however these questions might be answered, the segregation issue was an easy one. With respect to that issue, the conventional responses do have a "one-step-ahead-of-the-marshall" character. It is hardly a decisive objection to Black's argument that he has not specified all of its implications. Insofar as Black sketched an appealing conception of the equal protection clause, and memorably argued why segregation is inconsistent with that conception, he provided an enduring service for the legal culture.

### **III. Of Formalism and Institution-Blindness**

The vices of Black's essay are as interesting as its virtues, and they are no less important. In a way, Black's essay seems of its time; its sense of moral engagement with the issue of segregation has the unmistakable feel of certain academic writing in the late 1960s. But there is also a sense in which it is barely dated, taking the form of an entirely recognizable kind of modern legal argument, academic and otherwise. Black's effort to identify the principle behind the equal protection clause, and his explanation of why the practice in question violates that principle, is akin to countless current explorations of constitutional issues.

Like many of those explorations, Black's effort suffers from two serious problems. The first is a kind of formalism—an approach that ignores the inevitable role of evaluative judgments in constitutional interpretation. The second is a blindness to institutional considerations—a neglect of variables that might make courts hesitate to implement what would, as a matter of principle, count as the best interpretation of the Constitution. The legal culture has obtained a far better understanding of those considerations in the last two decades, and they help to illuminate difficulties in Black's approach.

### A. Black's Formalism

Formalism first. Black assumes far too readily that the equal protection clause forbids any intentional disadvantaging of African-Americans. The clause does not unambiguously do any such thing. It would be possible to understand the clause far more narrowly, in a way that does not touch the practice of “separate but equal.” All by itself, Plessy v. Ferguson provides some evidence of the plausibility of this reading: If an overwhelming majority of the Supreme Court concluded, not long after ratification, that the Fourteenth Amendment does not forbid “separate but equal,” then there is reason to think that this interpretation is at least textually plausible. In any case, a great deal of historical research supports the view that the Fourteenth Amendment was not meant to eliminate racial segregation and indeed that it was not meant to prohibit all intentional disadvantaging of African-Americans.<sup>26</sup> The Reconstruction Congress expressly permitted the schools of the District of Columbia to remain segregated.<sup>27</sup> The Fourteenth Amendment was meant to constitutionalize the Civil Rights Act of 1866, and the sponsors of that Act specifically disclaimed any intention to interfere with segregated education.<sup>28</sup>

In these circumstances, it is implausible to say that the equal protection clause necessarily has the meaning that Black ascribes to it. On narrow “originalist” grounds, Brown is not simple to defend. Without adopting anything like Black’s general understanding of the clause, Judge Michael McConnell, a committed originalist, has made the most sustained, even heroic effort to demonstrate that racial segregation was inconsistent with the original meaning of the Fourteenth Amendment.<sup>29</sup> McConnell places a great deal of emphasis on the efforts of Republicans in the Reconstruction Congress to include schools within the scope of the 1875 Civil Rights Act; and he does provide strong evidence that many and perhaps most legislators in that Congress believed

---

<sup>26</sup> See Richard Kluger, *Simple Justice* 633-34 (1976); Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 *Wash U L Q* 421, 460-62 (1977); Raoul Berger, *Government by Judiciary* 123-25 (1977).

<sup>27</sup> See Frank and Munro, *supra*, at 460-62.

<sup>28</sup> See Statement of James Wilson, *Cong Globe*, 39<sup>th</sup> Cong, 1<sup>st</sup> Sess 1117-1118 (1866).

<sup>29</sup> See Michael McConnell, *Originalism and the Desegregation decisions*, 81 *Va L Rev* 947 (1995).

that segregated schools were inconsistent with the principles underlying the Fourteenth Amendment. The fact remains, however, that the post-ratification views of members of Congress are not decisive evidence about constitutional meaning. Even more fundamentally, the efforts to ban segregated schools ultimately failed (even if they received considerable support within both houses of Congress). At most, Judge McConnell has demonstrated that Congress had the constitutional authority to outlaw racial segregation under the enforcement clause of the Fourteenth Amendment. He does not come close to showing what is necessary to establish the correctness of Brown on originalist grounds -- that the equal protection clause was originally understood as a self-executing ban on such segregation. Certainly Black does not demonstrate or even maintain that it was so understood.

It is not even clear what approach to constitutional interpretation Black means to endorse. Much of his argument seems to be roughly originalist, in the sense that he seems to understand the meaning of the clause in accordance with the understanding of its ratifiers. But he investigates the original understanding barely at all; his is not a historical exegesis. The most he does is to urge, in response to originalist-style objections to *Brown*, that any understanding of the view of 1866 calls for a “guess.” His fragmentary argument on this count is quite sophisticated: “To guess their verdict upon the institution as it functions in the mid-twentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid.” This suggestion presages some of the best contemporary discussions of how to deal with the original understanding in unanticipated circumstances.<sup>30</sup> But all this point shows is that the original understanding is not necessarily fatal to Brown; Black does not urge that the original understanding, carried forward to 1954, condemns school segregation. If a “guess” is what is required, then Black’s reading of the fourteenth amendment is not, strictly speaking, mandatory according to the tools that he himself purports to be using.

---

<sup>30</sup> See Mark Tushnet, *Following the Rules Laid Down: A Critique of Neutral Principles and Interpretivism*, 96 Harv L Rev 781 (1983); Larry Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165 (1993).

What tools is he actually using? To the extent that Black's reading emerges as permissive, a choice among plausible alternatives, we should see him as engaged in a distinctive kind of legal formalism—regrettably, the dishonorable kind,<sup>31</sup> one that pretends that a legal text has an unambiguous meaning even though normative judgments must be made in order to invest it with that meaning. For a modern analogue, consider the view, endorsed by a majority of the current Supreme Court, that strict scrutiny is required for affirmative action programs because the Constitution forbids states from denying equal protection to “any person.”<sup>32</sup> This too is a form of dishonorable formalism: The fact that the clause protects “any person” is neither here nor there on the question whether strict scrutiny, or something else, should be applied to affirmative action programs.

In the end, Black's reading of the equal protection clause can only be understood interpretive in Ronald Dworkin's sense of the word.<sup>33</sup> Black is attempting not to track the unambiguous meaning of that clause but to make best constructive sense of it, in a way that inevitably involves judgments of Black's own. Among the various possible interpretations, those that “fit” the clause and its history, Black is venturing an approach that seems most attractive to him on normative grounds. This point is not meant as an objection to Black's conclusions about the clause or the case. For constitutional interpretation, there is no avoiding normative judgments of one or another kind.<sup>34</sup> And perhaps his interpretation is preferable to any other; in fact I believe that it is.<sup>35</sup> The problem is that Black does not defend his approach against imaginable alternatives; he writes as if the principle can be read off the Constitution itself. If we were to be harsh, we might even say that Black's confidence about his view of the clause emerges as a form of self-delusion, a claim of necessity that masks normative judgments of Black's own.

---

<sup>31</sup> This kind of dishonorable formalism is an ugly sibling of the entirely honorable (though controversial) view that texts should be interpreted in accordance with their ordinary meaning and that judges ought not to rely on legislative history, statutory “purpose,” and the like. The best discussion is Adrian Vermeule, *Interpretive Choice*, NYU L Rev.

<sup>32</sup> See *City of Richmond v. Croson*, 488 US 469 (1989).

<sup>33</sup> See Ronald Dworkin, *Law's Empire* (1985).

<sup>34</sup> I cannot defend this point in detail here. See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996), for general discussion. Note that originalism itself represents a normative choice – to be originalist – and then in hard cases, of which *Brown* (as Black shows) is an example, originalists are unlikely to be able to make decisions simply by looking at history.

<sup>35</sup> See Cass R. Sunstein, *The Anticaste Principle*, [92 Mich. L. Rev. 2410 \(1994\)](#).

## **B. Black and Judicial Fallibility**

The second problem is that Black neglect institutional issues. He see his tasks as twofold: first, identification of the proper reading of the equal protection clause and second, measurement of segregation against the clause, properly read. This approach to the Constitution was typical of academic work in the 1960s and 1970s. It remains common today. But it has a significant weakness. Black does not admit the possibility that for a court, the proper reading of the clause is closely attuned to the institutional limitations of judges. The institutional turn of post-1980s scholarship has pointed to several reasons why this might be so. Judicial efforts to promote social reform might not be productive; they might even be counterproductive, endangering the very goals that the judges seek.<sup>36</sup> Judicial judgments about (legally relevant) moral values might not be reliable, and hence it might be best if judges, aware of their own moral fallibility, are reluctant to impose those values on the nation.<sup>37</sup> In any case judicial insistence on certain moral commitments, even appealing ones, might preempt democratic deliberation on the underlying questions; and if citizens have a right to be self-governing, judges might be interpret the Constitution with that right in mind.

If any of these claims is correct, then judges with a set of reasonable, optional interpretations might select the interpretation that the one that minimizes the judicial role in American society—not because that interpretation is best out of context, but because it is best-suited to judicial capacities. Emphasizing that their own readings are prone to error, judges might read constitutional clauses, whenever possible, in such a way as to minimize judicial intrusions into democratic processes. James Bradley Thayer famously defended “the rule of clear mistake”—the view that courts should uphold legislation unless it is unambiguously unconstitutional.<sup>38</sup> A limited reading of the equal protection clause, one that would not reach segregation, might be defended on the ground that it

---

<sup>36</sup> See Rosenberg, *supra* note.

<sup>37</sup> See Tushnet, *supra*.

<sup>38</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129 (1893).

reduces the judicial role in American life. I am not defending that limited reading; I am simply noticing that Black fails to explore the arguments that might be made in its favor.

Note that this limited reading would be a court-specific one. It would not preclude the possibility that other institutions, not facing the limitations of the judiciary, would understand the equal protection clause more broadly. Black did not pause to consider the possibility that in some areas, constitutional rights might be judicially underenforced, for institutional reasons stemming from the courts' properly limited role in American government.<sup>39</sup> If we take seriously a more general anticaste principle, judicial limitations seem highly relevant. A court that is committed to counteract the caste-like features of American society would closely scrutinize a number of seemingly neutral practices that have racially discriminatory effects, such as tests for education and employment on which whites do systematically better than African-Americans. To say the least, this close scrutiny would put courts into an awkward position.<sup>40</sup>

I have suggested the possibility that judges should adopt a narrower understanding of the equal protection clause simply because of an awareness of their own institutional weaknesses, recognizing that the broader reading might be acceptable or even preferable for other branches of government. If the meaning of the Constitution, at the judicial level, is a product of substantive theory and institutional constraint, then Black's reading of the equal protection clause might be rejected on the ground that it emphasizes the former but neglects the latter. Compare the contemporary question whether the Constitution requires states to recognize same-sex marriages. Let us suppose, as I believe, that the best interpretation of the equal protection clause does so require—that states have no adequate basis for discriminating against gays and lesbians in this way. Even if this is so, federal courts might hesitate to insist on that interpretation for prudential reasons.<sup>41</sup> The nation might reject the courts' interpretation, in a way that

---

<sup>39</sup> See Lawrence Sager, Fair Measure: The Status of Underenforced Constitutional Norms, 91 Harv L Rev 1212 (1978).

<sup>40</sup> See *Washington v. Davis*, 426 US 229 (1976).

<sup>41</sup> The case of state courts is different. See Cass R. Sunstein, *The New Republic* (2003).



disserves the very values at stake—a possibility that is relevant, whether or not it is decisive, for constitutional law.<sup>42</sup>

Alternatively, judges might have chosen to read the equal protection clause narrowly in the particular context of segregation, not because they are generally error-prone, but in the interest of ensuring that courts are not placed in an especially difficult remedial role. There can be no doubt that the political question doctrine has a pale echo in the numerous cases interpreting constitutional clauses so as to avoid collisions with other institutions.<sup>43</sup> In some contexts, the echo deserves to be a bit louder, simply because a ruling would force courts to engage in managerial tasks that are beyond their competence. Black does not confront this possibility in the context of school segregation, and it is a serious gap in his argument. His silence here is characteristic. Later in his life, Black made eloquent pleas on behalf of a constitutional requirement that governments provide a decent economic minimum -- a social safety net below which no citizen may be allowed to fall.<sup>44</sup> Put to one side the question whether this requirement can be found in the Constitution through appropriate interpretive methods. Even if it can, judicial oversight of the welfare system would put courts in a position for which they are especially ill-suited.<sup>45</sup>

None of this means that Brown is wrong; like nearly everyone else (now, as opposed to during the 1960s, when the legal culture was sharply divided), I believe that Black was right to insist that it was right. But Black's argument on its behalf is badly incomplete. It is not sufficient to identify the most appealing interpretation of a clause and then to measure a challenged practice against that interpretation. A pervasive question has to do with judicial capacities and competence.

## Conclusion

---

<sup>42</sup> For the classic discussion, by a contemporary of Black, see Alexander Bickel, *The Least Dangerous Branch* (1965).

<sup>43</sup> See, e.g., *Rostker v. Goldberg*, 453 US 57 (1981); this term's campaign finance decision.

<sup>44</sup> See Charles Black, *A New Birth of Freedom* (1997).

In a sense, Black's argument can be seen as a great triumph for legal realism in American constitutional law. What makes his essay so important is that it cuts through abstractions, pervasive in law schools and in courts, that had made it nearly impossible to see what Brown was about. I have criticized Black for his formalism and for his neglect of institutional considerations. But we need more voices like Charles Black's.

To see why, return to Herbert Wechsler's puzzlement about the lawfulness of the segregation decision. If we are to laugh at Wechsler, our laughter had better not be complacent. We should not treat Wechsler as a relic of history, someone whose errors cannot find analogues today. After all, Wechsler was extremely active in the civil rights movement, to which he was personally dedicated. As a lawyer, he helped to assist Thurgood Marshall and others in the attack on segregation. His difficulty in justifying Brown was not motivated by the slightest sympathy for the practices that the Court invalidated. Wechsler was anguished by that difficulty.

Wechsler's closing question was this: "Given a situation where the state must practically choose between denying the association to those who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"<sup>45</sup> Questions like this continue to haunt the legal system. But Black's answer is simple. By its very nature, the equality principle is not neutral between inequality and equality; and this is not an embarrassment for the equality principle. That answer is not just Black's but Brown's as well. I think that it has enduring and insufficiently appreciated implications for constitutional law in general.

---

<sup>45</sup> I discuss this question in Cass R. Sunstein, *The Partial Constitution* (1993).

<sup>46</sup> Wechsler, *supra* note.

Readers with comments may address them to:

Cass R. Sunstein  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637

## University of Chicago Law School

### Public Law and Legal Theory Working Paper Series

1. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (November 1999; *Ethics*, v. 110, no. 1).
2. Joseph Isenbergh, Impeachment and Presidential Immunity from Judicial Process (November 1999; forthcoming *Yale Law and Policy Review* v.18 #1).
3. Cass R. Sunstein, Is the Clean Air Act Unconstitutional? (August 1999; *Michigan Law Review* #3).
4. Elizabeth Garrett, The Law and Economics of “Informed Voter” Ballot Notations (November 1999, *University of Virginia Law Review*, v. 85).
5. David A. Strauss, Do Constitutional Amendments Matter? (November 1999)
6. Cass R. Sunstein, Standing for Animals (November 1999)
7. Cass R. Sunstein, Culture and Government Money: A Guide for the Perplexed (April 2000).
8. Emily Buss, Without Peers? The Blind Spot in the Debate over How to Allocate Educational Control between Parent and State (April 2000).
9. David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle (June 2000).
10. Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent (May 2000; *Pennsylvania Law Review* v. 149).
11. Mary Ann Case, Lessons for the Future of Affirmative Action from the Past of the Religion Clauses? (May 2001, *Supreme Court Review*, 2000)
12. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May, 2000).
13. Jill Elaine Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations
14. Elizabeth Garrett, Institutional Lessons from the 2000 Presidential Election (May 2001).
15. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001).
16. Jack Goldsmith, The Internet and the Legitimacy of Remote Cross-Border Searches (October 2001).
17. Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects? (October 2001).
18. Cass R. Sunstein, Of Artificial Intelligence and Legal Reasoning (November 2001).
19. Elizabeth Garrett, The Future of Campaign Finance Reform Laws in the Courts and in Congress, The William J. Brennan Lecture in Constitutional Law (December 2001).
20. Julie Roin, Taxation without Coordination (March 2002).
21. Geoffrey R. Stone, Above the Law: Research Methods, Ethics, and the Law of Privilege (March 2002; forthcoming *J. Sociological Methodology* 2002).

22. Cass R. Sunstein, Is There a Constitutional Right to Clone? (March 2002).
23. Emily Buss, Parental Rights (May 2002, forthcoming Virginia Law Review).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
25. David A. Strauss, The Common Law Genius of the Warren Court (May 2002).
26. Jack Goldsmith and Ryan Goodman, U.S. Civil Litigation and International Terrorism (June 2002).
27. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
29. Elizabeth Garrett, Is the Party Over? The Court and the Political Process (August 2002).
30. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002).
31. Joseph Isenbergh, Activists Vote Twice (November 2002).
32. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002).
33. Cass R. Sunstein, Hazardous Heuristics (November 2002).
34. Cass R. Sunstein, Conformity and Dissent (November 2002).
35. Jill Elaine Hasday, The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education (December 2002).
36. Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees? (January 2003).
37. Adrian Vermeule, *Mead* in the Trenches (January 2003).
38. Cass R. Sunstein, Beyond the Precautionary Principle (January 2003).
39. Adrian Vermeule, The Constitutional Law of Congressional Procedure (February 2003).
40. Eric A. Posner and Adrian Vermeule, Transitional Justice as Ordinary Justice (March 2003).
41. Emily Buss, Children's Associational Rights? Why Less Is More (March 2003)
42. Emily Buss, The Speech Enhancing Effect of Internet Regulation (March 2003)
43. Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron (May 2003)
44. Elizabeth Garrett, Legislating *Chevron* (April 2003)
45. Eric A. Posner, Transfer Regulations and Cost-Effectiveness Analysis (April 2003)
46. Mary Ann Case, Developing a Taste for Not Being Discriminated Against (May 2003)
47. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
48. Eric Posner and Adrian Vermeule, Accommodating Emergencies (September 2003)
49. Adrian Vermeule, The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory (September 2003)

50. Cass R. Sunstein, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (September 2003)
51. Bernard E. Harcourt, Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally (November 2003)
52. Jenia Iontcheva, Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court (January 2004)
53. Lior Jacob Strahilevitz, The Right to Destroy (January 2004)
54. Adrian Vermeule, Submajority Rules (in Legislatures and Elsewhere) (January 2004)
55. Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism (January 2004)
56. Catharine A. MacKinnon, Directions in Sexual Harrassment Law: Afterword (January 2004)
57. Cass R. Sunstein, Black on Brown (February 2004)